

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

_____)	
In the Matter of)	
)	
Implementation of the Pay Telephone)	CC Docket No. 96-128
Reclassification and Compensation)	
Provisions of the Telecommunications)	File No. NSD-L-99-34
Act of 1996)	
_____)	

**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
ON PETITIONS FOR RECONSIDERATION**

Albert H. Kramer
Robert F. Aldrich

2101 L Street, N.W.
Washington, DC 20037-1526
(202) 828-2226

*Attorneys for the American Public
Communications Council*

February 10, 2004

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS	i
I. THE FCC MUST ENSURE THAT INTERMEDIATE CARRIERS ARE LIABLE FOR PAYMENT OF COMPENSATION IF A SBR DOES NOT QUALIFY TO BE A COMPENSATION PAYER	2
II. THE COMMISSION SHOULD NOT LIMIT COMPLETING CARRIERS' TRACKING AND REPORTING OBLIGATION TO COMPLETED CALLS.....	6
III. THE COMMISSION SHOULD NOT GRANT SPRINT'S REQUEST TO DILUTE THE REQUIREMENT THAT A CARRIER'S CFO MUST VERIFY THAT THE CARRIER IS ACCURATELY TRACKING CALLS.....	8
CONCLUSION.....	10

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)

Implementation of the Pay Telephone) CC Docket No. 96-128

Reclassification and Compensation)

Provisions of the Telecommunications) File No. NSD-L-99-34

Act of 1996)

**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
ON PETITIONS FOR RECONSIDERATION**

The American Public Communications Council ("APCC") hereby comments on the petitions for clarification and/or reconsideration filed by AT&T and Sprint Corporation¹ regarding the Commission's report and order in the above-captioned docket, released on October 3, 2003, and published in the Federal Register on November 6, 2003. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 03-235 (rel. October 3, 2003) ("Order").

¹ AT&T, Petition for Clarification, or in the Alternative, Reconsideration, filed December 8, 2003 ("AT&T Petition"); Sprint Corporation, Petition for Reconsideration, filed December 8, 2003 ("Sprint Petition"). Petitions for clarification and/or reconsideration were also filed by APCC itself and by the RBOC Payphone Coalition. APCC, Petition for Clarification or Partial Reconsideration, filed December 8, 2003 ("APCC Petition"). RBOC Payphone Coalition, Petition for Reconsideration and Clarification, filed December 8, 2003 ("RBOC Petition"). APCC concurs with the RBOC Petition, which requests some of the same relief APCC has requested.

The Commission's overarching responsibilities in this proceeding are to "promote the widespread deployment of payphones in the public interest" and, to that end, to "ensure that payphone service providers are fairly compensated for each and every completed . . . call made from their payphone[s]." 47 U.S.C. § 276(b)(1)(A). Each of the pending petitions must be evaluated in light of these core requirements.

I. THE FCC MUST ENSURE THAT INTERMEDIATE CARRIERS ARE LIABLE FOR PAYMENT OF COMPENSATION IF A SBR DOES NOT QUALIFY TO BE A COMPENSATION PAYER

AT&T requests the Commission to rule that, where a switch-based reseller ("SBR") and an Intermediate Carrier ("IC") agree that the IC will pay compensation "on behalf of the SBR" on 100% of the calls delivered to the SBR's platform, such an arrangement may be implemented without the concurrence of payphone service providers ("PSPs"). AT&T Petition at 4-5. Thus, AT&T is actually requesting two rulings. First, it requests a ruling that PSPs' consent is not required for an IC to pay PSPs on 100% of calls routed to a SBR switch. Second, AT&T requests a ruling that PSPs' consent is not required for an IC to pay compensation "on behalf of" a SBR, even though the SBR has not qualified to pay compensation directly by undergoing a system audit and submitting a certification to the FCC. AT&T Petition at 4 & n.3.

As to the first proposition, APCC is not opposed in general to a ruling that an IC may make payment on 100% of the calls delivered to a SBR's platform.² In general, such

² In discussing prior examples of this practice, AT&T misstates the rule currently in effect, although the mistake is not necessarily relevant to the validity of its argument. As is well known to all major participants in the compensation process, the Commission's Second Order on Reconsideration in this proceeding did *not* "requir[e]" the first facilities-based interexchange carrier ("IXC") to which a call is routed to "compensate the PSP even if the IXC did not complete the call." *Id.*, n.3, citing *Pay*

an approach is likely to increase PSPs' compensation revenue and serve the core objectives of Section 276.

AT&T's second proposition, however, should be rejected. AT&T argues that PSP consent should not be required for ICs to pay "on behalf of" SBRs, because under the current rule "PSPs have . . . been compensated on this basis, and it would be unreasonable for the PSP to withhold consent" AT&T Petition at 4-5. But, as AT&T acknowledges in footnote 3 of its petition, the current rule places compensation *liability* squarely on the first facilities-based IXC. By contrast, under the relief requested in the AT&T Petition, "any IXC who agrees to accept the tracking and reporting payment requirements on behalf of a SBR would act as its conduit, not its guarantor." AT&T Petition at 4, n.3. In other words,³ even though the facilities-based IXC would

(Footnote continued)

Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Order on Reconsideration, 16 FCC Rcd 8098 (2001). Rather, the Commission required first facilities-based IXCs to compensate PSPs on all calls completed to end users. Indeed, AT&T caused a great deal of disruption to PSPs by claiming to have initially compensated PSPs on 100% of calls routed to SBR platforms, and then, without providing advance notice and without providing sufficient data to explain the basis for its action, unilaterally *taking back* compensation (by deducting the alleged excess from future compensation payments) for calls that its SBR customers belatedly reported as uncompleted. AT&T has not agreed to cease this practice.

³ AT&T persists in using the term "guarantor" in describing the IXC's responsibility to pay for calls routed to SBRs under the current rule. Contrary to AT&T's implication in employing this term, the SBRs are not the "rightful" payers as a matter of some natural law or policy making them so. SBRs are the "rightful" payers only if, and to the extent that, the Commission adopts regulations making SBRs the payers. Whether and under what circumstances the regulations should make SBRs payers, despite the utter and acknowledged failure of the Commission's previous SBR-pays rule, is the subject of this proceeding.

volunteer to perform the tracking, reporting, and compensation payment *functions*, ultimate *liability* for payment of the appropriate amount of compensation would fall on the SBR.

As explained in the APCC Petition and the RBOC Petition, there is no legitimate reason to place ultimate compensation liability on SBRs that lack the capability to accurately track calls and administer compensation payments. The new compensation rules appropriately provide that obtaining a system audit is a “precondition” to a carrier’s ability to make payments under the new compensation rules. *Order*, Appx. C., § 64.1320(a); *see also* APCC Petition at 2-4; RBOC Petition at 16-19. Therefore, SBRs become liable to pay compensation only after they have qualified to assume liability by undergoing the required system audit and making the required certification of their ability to track and pay. While the order and rule are ambiguous as to where default liability resides, this is the only approach that is consistent with the requirement to ensure that PSP’s are compensated for “each and every” completed call. APCC Petition at 1-18.

Allowing ICs to “act as a conduit” for payment by SBRs does not address the obvious and fundamental flaw in a rule that places ultimate liability on unqualified SBRs. Simply put, if PSPs must ultimately enforce their compensation rights by chasing after IXC’s who have taken no responsibility for setting up a reliable call tracking and payment system, there is no way that such a system can ensure compensation for “each and every” call. Divorcing liability from tracking and payment responsibility would leave payment extremely uncertain for PSPs and would add confusion and complexity to the compensation process. Although the current rules permit a carrier to contract for the performance of tracking and/or payment by a third party, the rules do not

contemplate that a SBR would become liable for payment without even supervising the third party's performance of tracking and payment functions. Indeed, the whole purpose of the audit and certification requirements is to ensure that those SBRs that become liable for payment will take their payment responsibilities seriously and will be involved in the process to the extent necessary to be able to certify that their compensation payments are accurate. Having IXCs perform all tracking and payment functions while disclaiming any ultimate liability could leave PSPs with the worst of both worlds: PSPs would be dependent for their compensation on accurate call tracking by a carrier with no incentive to perform it properly, and in the event of incorrect payments, PSPs would still have to chase after SBRs in order to be made whole. Moreover, a PSP that believed it was underpaid would not only have to bring a proceeding against the SBR, but could be faced with the necessity of bringing in the facilities-based carrier as a party to the proceeding in order to gain access to the relevant evidence.

Rather, the Commission should rule that, where a SBR has not qualified itself as a responsible payer by complying with the audit and certification requirement of the new rule, the IC is liable to pay compensation, and that an unqualified SBR may not assume liability for payment without the PSP's consent. Therefore, the Commission should not grant the AT&T Petition as framed. When the Intermediate Carrier has the ultimate liability for payment (as APCC believes is and should be the case whenever a SBR fails to qualify under the audit and certification requirements), however, APCC has no objection to that carrier paying on 100% of the calls routed to the SBR switch.

II. THE COMMISSION SHOULD NOT LIMIT COMPLETING CARRIERS' TRACKING AND REPORTING OBLIGATION TO COMPLETED CALLS

AT&T requests the Commission to amend Section 64.1310(a)(4)(i) of the new compensation rules to clarify that Completing Carriers are not required to list, in their quarterly reports to PSPs, any toll-free numbers for which calls were dialed from the PSP's payphones but for which no call was recorded by the Completing Carrier as completed. AT&T Petition at 2-4 citing *Order*, Appx. C. AT&T explains that a requirement to report numbers that had only uncompleted calls "could be read to expand a Completing Carrier's reporting responsibilities to include . . . numbers that are . . . forwarded to another carrier, such as a SBR, for completion." *Id.*, at 2-3.

APCC agrees that when calls are terminated at a SBR's toll-free number, and the SBR has complied with the audit and certification requirement the carrier that provides toll-free services to the SBR should report the call in an Intermediate Carrier report, and need not report the same call in its own Completing Carrier report.⁴ As long as the carrier makes clear what kinds of calls are included in which report, it is not necessary to file duplicative information in both reports.

AT&T's petition, however, goes further, and requests clarification that a Completing Carrier may exclude from its Completing Carrier reports *all* toll-free

⁴ Under the Commission's new rules, a carrier (such as AT&T) that uses its own transmission facilities to provide service to both end users and SBRs must [provide two kinds of reports to PSPs (hereafter "first facilities-based IXC" "FFIXC"). For calls dialed to end users and other entities that do not have a direct-payment obligation, the FIXC must provide a Completing Carrier report pursuant to Section 64.1310(a)(4)(i) of the new rules. For calls routed to SBRs that have qualified to pay compensation directly, the FFIXC must provide an Intermediate Carrier report. The SBR must also provide a Completing Carrier report for the same calls.

numbers for which the carrier only records uncompleted calls from a payphone. AT&T states that “[s]uch revision of Section 64.1310(a)(4)(i) would more accurately reflect a Completing Carrier’s obligation to track and compensate PSPs for only payphone calls that it completes.” AT&T at 4.

APCC strongly disagrees with AT&T’s claims that it is unnecessary for Completing Carriers to track uncompleted calls dialed to its end-user customers’ toll-free numbers. As explained in the APCC Petition: “It is . . . precisely those calls that are regarded by the carrier as uncompleted that are most likely to become the subject of a dispute.” APCC Petition at 20. As APCC further explained:

A PSP ordinarily is not going to dispute the carrier’s disposition of calls that the carrier records as completed, because the PSP has been paid for those calls. Rather, the PSP will contend that calls recorded as “uncompleted” were in fact completed. Under the Commission’s rule, a PSP that disputes a carrier’s count of completed calls may find that there is no available call detail to verify any of the “uncompleted” calls in dispute. Without such data, there is no way to definitely establish the true number of completed calls or whether the Completing Carrier has underreported completed calls.

In light of the Commission’s purpose to ensure that PSPs have “access to necessary data in the event of disputes” (*Order*, ¶ 45), it is unreasonable to require a carrier to maintain data only on undisputed calls, while allowing the carrier to destroy data on the very calls that would be subject to dispute. The requirement that Completing Carriers preserve data to help resolve disputes is thus fatally weakened if carriers do not have to preserve data on uncompleted calls.

Id. at 20-21. Rather than amending its rules, as AT&T proposes, to eliminate any tracking and reporting obligation as to uncompleted calls, the Commission should grant the APCC Petition and amend Section 64.1310(a)(4)(ii) to make clear that Completing Carriers must record call detail and report call volumes for calls that were attempted but not completed, as well as for completed calls.

With respect to calls routed to SBRs that have qualified to pay compensation directly, however, APCC agrees that such calls need not be reported in the FFIXC's Completing Carrier report – provided that they are reported in the FFIXC's Intermediate Carrier report and the SBR's Completing Carrier report. In conjunction with the changes proposed in the APCC Petition, APCC would have no objection to the Commission amending its rules to read:

(4) At the conclusion of each quarter, the Completing Carrier shall submit to the payphone service provider, in computer readable format, a report on that quarter that includes:

(i) A list of the toll-free and access numbers dialed from each of that payphone service provider's payphones (**except for numbers that are reported by the same carrier in the role of an Intermediate Carrier, pursuant to Section 64.1310(c)(2))** and the ANI for each payphone;

See Order, Appx. C.

III. THE COMMISSION SHOULD NOT GRANT SPRINT'S REQUEST TO DILUTE THE REQUIREMENT THAT A CARRIER'S CFO MUST VERIFY THAT THE CARRIER IS ACCURATELY TRACKING CALLS

Sprint has requested the Commission to relieve carriers of the requirement, in Section 64.1310(a)(3) of the new rules, that a carrier's chief financial officer ("CFO") must provide PSPs a sworn statement verifying that the carrier is accurately tracking calls. The Commission should deny the Sprint Petition.

The Commission adopted the CFO signature requirement as a necessary response to rampant abuse of the Commission's payphone compensation rules by switch-based resellers. For years, dozens of SBRs evaded making any compensation payment at all. The CFO statement goes hand-in-hand with the audit requirement also adopted by the Commission in the October 13, 2003, *Order*. Both requirements are needed to ensure that, at long last, carriers give their payphone compensation

procedures the serious attention they deserve. A CFO generally has the responsibility to ensure accuracy and honesty in all of a corporation's financial dealings. Requiring a carrier's CFO to verify the accuracy and honesty of a carrier's tracking and payment process is fully consistent with a CFO's other obligations.

Moreover, there is precedent in the Commission's payphone decisions for the requirement that a high-level corporate officer provide verification regarding payphone compensation. The Commission has required PSPs whose payphones are connected to ordinary business lines to provide an affidavit signed by the PSP's president, attesting that its payphones are in place and in working order, in order to qualify to receive compensation. *See Policies and Rules Concerning Operator Service Access and Payphone Compensation*, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7151, 7157, ¶ 41 (1993).

Allowing any corporate officer to sign the required verification would send precisely the wrong signal to carriers. It could suggest to carriers that the Commission might not strictly enforce the compensation obligation, or that carriers can avoid penalties for non-compliance by asserting that inaccurate payments or outright failure to pay resulted from mistakes or malfeasance by a low-level corporate officer. At a time when hundreds of resellers are getting ready to resume participation in the compensation system – or, in most cases, participate in it for the first time – it is clearly the wrong time for the Commission to dilute rules that are designed to ensure that carriers take their obligations seriously.

For the vast majority of carriers, as Sprint seems to recognize, it would not be unduly burdensome for the CFO to sign the verification. Sprint Petition at 2 (“At a small carrier, the CFO may be an appropriate officer to provide this certification”). If

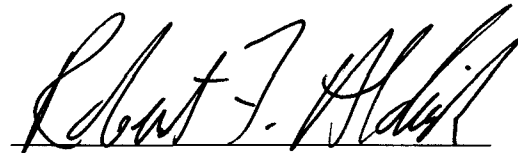
Sprint believes its CFO has too many other burdens to personally comply with this rule, then Sprint should seek a waiver of the rule, and set forth with particularity the facts that make it impossible for Sprint's CFO to pay sufficient attention to payphone compensation. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

CONCLUSION

The Commission should rule on the pending petitions for reconsideration or clarification in accordance with the foregoing comments.

Dated: February 10, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

Albert H. Kramer

Robert F. Aldrich

2101 L Street, N.W.
Washington, D.C. 20037-1526
(202)828-2226

*Attorneys for the American Public
Communications Council*

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2004, copies of the foregoing Comments of the American Public Communications Council on Petitions for Reconsideration and/or Clarification were served on the parties (except those marked with an asterisk) via first-class mail. Copies were served on the parties marked with an asterisk (*) via electronic mail on February 10, 2004.

Jeff Carlisle*
Senior Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C356
Washington, DC 20554

Henry Thaggert*
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C450
Washington, DC 20554

Darryl Cooper*
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W., Room 6-C143
Washington, DC 20554

John E. Benedict
H. Richard Juhnke
Sprint Corporation
401 Ninth Street, N.W.
Suite 400
Washington, DC 20004

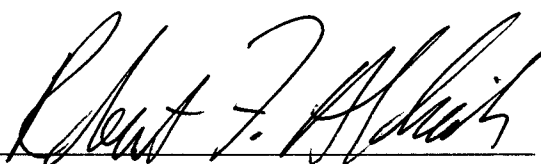
Robert Tanner*
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W., 5-C235
Washington, DC 20554

Joshua Swift*
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C433
Washington, DC 20554

Michael K. Kellogg
Aaron M. Panner
Kellogg, Huber, Hansen, Todd
& Evans, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036

Lawrence J. Lafaro
Stephen C. Garavito
Martha Lewis Marcus
AT&T Corp., Room A229
900 Route 202/206 North
Bedminster, NJ 07921

Larry Fenster
MCI WorldCom
1133 19th Street, N.W.
Washington, DC 20036



Robert F. Aldrich